UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HELENA L. MYERS Plaintiff,	)	
v.	)	CIVIL ACTION NO. 06-10018-DPW
CONTINENTAL CASUALTY COMPANY Defendant.	)	

MEMORANDUM AND ORDER
May 3, 2007

Plaintiff Helena L. Myers ("Myers") filed this *pro se* complaint against Defendant Continental Casualty Company ("Continental"), her former employer, alleging she was terminated in violation of federal and state age and race discrimination statutes. Defendant has moved for summary judgment on all counts.

I. BACKGROUND[1]

Myers was hired by Continental on June 30, 1986. She originally worked in Continental's Silver Spring, Maryland office, but that office was downsized and she was transferred to the Quincy, Massachusetts office in September of 1995. Myers did

[1] Myers did not respond to Defendant's Statement of Undisputed Material Facts directly, so it is unclear exactly what she is disputing. A customary application of Local Rule 56.1 deems anything not disputed to be admitted. In general, I have taken the background information from Defendant's Statement of Undisputed Material Facts, because it cites more consistently to the record. Where it appears Myers would dispute a factual allegation, this is noted.

not have a written employment contract, and was apparently unaware that she was considered an at-will employee. Over the more than eighteen years Myers worked for Continental, she consistently received merit raises and promotions, increasing her salary from $26,000.16 to $68,415.36. Her evaluations were generally positive.

By 2002, Myers was working as a Claims Consultant in the Commercial Auto Department in the Quincy Office. On or about April 1, 2003, Myers came under the supervision of a new Claims Manager, Robert,[2] after her previous supervisor left the company. In November of 2003, Continental reorganized its Northeast offices, and Robert's group in Quincy came under the supervision of Claims Director Beth Downs ("Downs"), who worked out of the company's Reading, Pennsylvania office.

In early 2004, Continental performed an audit of its Northeast offices, to determine where improvements could be made to the claims process. As part of this audit, a team consisting of two Northeast Regional Operations Consultants, the Northeast Regional Litigation Director, and human resource managers came to the Quincy office in March of 2004. The results of the Quincy Auto Department audit were unsatisfactory to the company. Before the audit, Continental had received complaints from brokers,

[2] For privacy reasons, Continental refers to all terminated employees by first name (or first name plus last initial, if necessary).

policyholders, and claimants about the claims management process, and the company had noticed several large reserve increases on older claims, which indicated a failure to evaluate the claim adequately in the early stages. After questioning Robert about the problems, the audit team decided that he was a poor manager, and that his entire team, consisting of eight employees, had serious performance issues. Robert was fired, and the employees he supervised were advised that their performance needed to improve significantly.

Specifically, Downs came to Quincy and explained to Robert's team that Continental was unhappy with the results of the audit. The company decided to realign the work assignments of Robert's team, so that each employee would handle one specific type of assignment, rather than working on a variety of claims. Myers, along with one colleague, Jay, was assigned a new supervisor, Eric Thompson ("Thompson"), who worked out of the Reading office. Myers was assigned to handle non-litigated bodily injury claims, and switched some of her caseload with Jay, who was assigned her litigation cases.

On April 5, 2004, Downs held a meeting with all members of the Quincy Auto team. Thompson was also present at the meeting. The eight auto claims specialists were provided with their new assignments and were given a copy of Continental's "Liability Claim Handling Guidelines," which described proper claim handling procedures in detail. Each was also told that he or she would

receive a "Performance Improvement Plan" to correct deficiencies resulting from Robert's poor supervision.

After the group meeting, Myers had an individual meeting with Downs and Thompson to discuss her Performance Improvement Plan. This meeting was the first time Myers and Thompson had met in person, although they had previously spoken on the telephone. Myers thought that Thompson looked surprised that she was African-American when the two were introduced. She based this conclusion on her perception that he seemed awkward when he shook her hand and smiled in a way that seemed unnatural. Myers also thought Thompson's initial conversation, when he asked how long she had been in the Quincy office, indicated that he was "fishing" for something to talk about comfortably. Myers does not allege that Thompson was hostile, or that he said anything inappropriate to her.

In the individual meeting, Myers expressed frustration that she would be handling exclusively non-litigated matters, because she felt that her strength was handling litigated cases, and she saw the move as a demotion. Downs explained that the company wanted to use her seniority and knowledge at the front end of a claim, because she had a feel for what would be required if the case were to be litigated, and she could help cases develop if they ended up having to go to trial. Myers accepted this explanation. Thompson told Myers he was sure she would do a good job in whatever position she held. Downs and Thompson emphasized

that a large part of handling non-litigated claims was conducting the initial investigation, which Myers understood from her experience at Continental. Myers was given her Performance Improvement Plan, which outlined various goals and stated that she had 90 days to bring her pending files into compliance. All other members of Robert's team were given similar Performance Improvement Plans by their new direct supervisors, following the April 5, 2004 group meeting.

Approximately one month after receiving the Performance Improvement Plan, Myers met with Thompson to discuss getting outside assistance with her files. In that meeting, Myers felt that Thompson was "all business." On June 8, 2004, Thompson called Myers to discuss her progress, and she told him that she had a lot of cases ready to be settled. Thompson told Myers that she was supposed to be investigating claims, not settling them, and asked her to send the files for settlement-ready claims to Wendy Long ("Long"), a Claims Specialist in Continental's New Jersey office. Myers suggested that she instead send new files to Long, and keep working on the settlements, but Thompson reiterated his position, and followed up with an email instructing Myers to send the settlement files to Long. Myers replied to the email message on June 11, 2004, after apparently being out of the office since the telephone conversation three days earlier, acknowledging she had primarily been working on settlements, and agreeing to send the files to Long.

On June 14, 2004, Thompson met with Dolores Thomas ("Thomas"), a Human Resources Consulting Director at the company, to discuss ways he might assist Myers, after learning she had not been focusing on the investigations she needed to complete. The next day, Thompson met with Myers to discuss how she planned to meet the goals of the Performance Improvement Plan. In a review of Myers' files in July of 2004, 33% were rated "Needs Improvement" and 67% were rated "Satisfactory." This performance was worse than in April of 2004.

After the July file review, Thompson, Downs, and Thomas agreed that Myers should be placed on a more formal improvement plan, and she was given a Performance Deficiency Memo, which documented five areas that needed improvement. Myers was also informed that her performance rating had dropped from a 2 to a 4 (the lowest level), and she was given thirty days to comply with the conditions in the Performance Deficiency Memo or risk further sanctions, including termination. Myers signed the Performance Deficiency Memo to acknowledge receipt, but added a note saying she disagreed with the assessment of her performance, and did not think she had problems. After being warned by Thompson that she needed to take vacation days or lose the days, Myers took several vacation days during the 30-day period after she was given the Performance Deficiency Memo. As a result, she was given extra time to meet the goals outlined for her.

On September 14, 2004, Myers' files were again reviewed.

This review found a substantial decline in her work product since July, and only 33% of her work was rated as "Satisfactory." Myers was terminated on September 28, 2004, after Downs, Thompson, and Thomas made a decision to do so. Following her termination, Myers' files were distributed to other employees in Quincy, as well as other Continental employees in Reading and in Melville, New York. Her position was not filled.

Of Myers' seven co-workers, five either resigned or were terminated at roughly the same time Myers was terminated. Two of Myers' co-workers, Jay and Robert F, both 41-year-old male Caucasians, were deemed to have shown sufficient improvement by the July file review that they were not given Performance Deficiency Memos and remained with Continental.

II. DISCRIMINATION CLAIMS

Myers claims that she was discriminated against based on her age and race, in violation of state and federal anti-discrimination laws, specifically Mass. Gen. Laws ch. 151B, §4 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e.[3]

A. *Summary Judgment Standard*

Summary judgment is appropriate when "the pleadings,

[3] Myers' Amended Complaint does not specify the legal basis for her claims, but she clarifies the matter somewhat in her Opposition to Summary Judgment, at 1. She could also intend to bring the age discrimination count under the Age Discrimination in Employment Act, 29 U.S.C. § 621, although she only cites to state law in the Amended Complaint.

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment must make a preliminary showing that no genuine issue of material fact exists. *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995), *cert. denied*, 515 U.S. 1103 (1995). Once the movant makes such a showing, the nonmovant must point to specific facts demonstrating that there is, indeed, a trialworthy issue. *Id.*

A fact is "material" if it has the "potential to affect the outcome of the suit under the applicable law." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 52 (1st Cir. 2000), and a "genuine" issue is one supported by such evidence that "a 'reasonable jury, drawing favorable inferences,' could resolve it in favor of the nonmoving party." *Triangle Trading Co., Inc. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (quoting *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 428 (1st Cir. 1996)). "[C]onclusory allegations, improbable inferences, and unsupported speculation," are insufficient to establish a genuine dispute of fact. *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

Summary judgment is appropriate in employment discrimination cases, but caution is warranted when issues of motive or intent

are implicated. *Petitti v. New England Tel. & Tel. Co.*, 909 F.2d 28, 31 (1st Cir. 1990). Even in the discrimination context, the nonmovant must do more than simply rest on "unsupported allegations and speculations." *Id.*

B. Discrimination Analysis[4]

Massachusetts state courts have construed Mass. Gen. Laws ch. 151B as containing four elements an employee must prove to prevail on an employment discrimination claim: membership in a protected class, harm, discriminatory animus, and causation. *Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. 34, 39 (Mass. 2005) (citing *Lipchitz v. Raytheon Co.*, 434 Mass. 493, 502 (Mass. 2001)). Myers clearly satisfies the first two elements, for age, gender, and race, given that she was a forty-nine year-old African-American woman at the time of her termination. The final two elements are more difficult to prove, and direct evidence is rarely available. Therefore, a plaintiff may establish one or both by indirect or circumstantial evidence, using the three-stage, burden-shifting paradigm set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). *Sullivan*, 444 Mass. at 39-40. The *McDonnell Douglas* framework does not remove the

[4] I have focused the discrimination analysis on Myers' state law claims, because she does not appear to have filed a complaint with the EEOC as required as a predicate to a suit under Title VII, and she does not reference the ADEA in any of her materials. I note that in any event state and federal discrimination law do not materially differ on the significant issues in this case.

plaintiff's burden to prove all essential elements of her discrimination claim, but does permit a factfinder to "infer discriminatory animus and causation from proof that an employer has advanced a false reason for the adverse employment decision, [even] in the absence of direct evidence that the actual motivation was discrimination." *Sullivan*, 444 Mass. at 40 (citations omitted).

1. The *prima facie* case

Under *McDonnell Douglas*, Myers bears the initial burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination. *Sullivan*, 444 Mass. at 40. This burden is not onerous, and she must simply produce evidence that Continental's actions "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Sullivan*, 444 Mass. at 40 (citations omitted). If Myers makes out a *prima facie* case, she is entitled to a "legally mandatory, rebuttable presumption" that her termination was discriminatory, and she will prevail if Continental fails to satisfy its burden of production at the second stage of the *McDonnell Douglas* framework. *Sullivan*, 444 Mass. at 40 (citations omitted).

A terminated plaintiff generally establishes a *prima facie* case by producing evidence that (1) she is a member of a protected class, (2) she performed her job at an acceptable level, (3) she was terminated, and (4) her employer sought to

fill her position by hiring another individual with similar qualifications. *Sullivan*, 444 Mass. at 41 (citations omitted). It is undisputed that Myers is a member of the relevant protected classes, and that she was terminated. Continental maintains that she did not perform her job at an acceptable level, and that she was not replaced because her position was eliminated.

The question of whether Myers was performing adequately is inherently factual. It is undisputed that her performance was adequate for much of her tenure at Continental. The company has argued that her performance declined significantly, and has produced evidence that this was the case, but Myers has argued that the mode of evaluation shifted from an objective one (how many cases she closed) to a subjective one (whether she conducted an adequate investigation), leaving Continental free to downgrade her evaluations at will. Under the circumstances, and given that the *prima facie* case is not intended to be a high hurdle, *see Sullivan*, 444 Mass. at 45, it would be inappropriate at this stage in the analysis to determine that Myers' performance was inadequate.

However, Myers has failed to provide any evidence that she was replaced. Under the standard *McDonnell Douglas* analysis, this fact alone would prevent her from making out a *prima facie* case of discrimination. Nevertheless, it may be more appropriate to analyze her case in the *Sullivan* framework of an overall force

reduction, since Continental appears to have been downsizing the department when Myers was terminated, and closed the Quincy office where she worked within two years of her termination. In this scenario, Myers would not have to show that she was replaced, a factual impossibility in a force reduction, but that "her layoff occurred in circumstances that would raise a reasonable inference of unlawful discrimination." *Sullivan*, 444 Mass. at 45 (citations omitted).

Although Myers has provided extremely limited evidence, what she has presented is arguably sufficient to make out a *prima facie* case under a force reduction theory for age discrimination but not racial discrimination.

Myers' theory with respect to age discrimination is tenuous and is supported by no statistical evidence but it may, as noted, be sufficient to make out a *prima facie* case. In a nutshell, Myers alleges that Continental downsized the Auto Group in Quincy to the eight members of Robert's team, keeping only employees 35 years of age or older, with the intention of inducing their departure or, if necessary, terminating them for cause. Under this theory, the audit was merely a pretense to create "cause" to terminate older employees.

There are a number of problems with this theory. First, and most fundamentally, Myers has provided no evidence that the employees transferred out of the department were younger than

35,[5] or that these employees were ever paid severance. Second, both of the employees retained by Continental when Myers was terminated were over 40 years old, so they would be in the same protected class she was in. Regardless, a very generous factfinder could arguably draw a reasonable inference that Continental created a group of older employees, and then set up a situation where they would be terminated for cause and not given severance.[6]

Myers has presented no evidence to support a claim of racial discrimination. Her impression that her new supervisor was "surprised" to meet her and see that she was African-American is insufficient, when she points to no evidence of any statements or actions on his part which might demonstrate racial animus. Myers has presented no other evidence, direct or indirect, of racial animus, so she has failed to make out a *prima facie* case of

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[5]Although the legally protected class for age discrimination is employees over age 40, Continental's termination policy offered employees age 35 or older additional severance benefits. Myers' theory is that the company's termination policy encouraged improperly age-based decisionmaking, even when, as in the case of Shelly, a 39-year-old employee, the employee might fall within the more favorable company policy but not be covered by age-discrimination statutes.

[6]In the absence of any statistical evidence, I would normally be inclined to find that Myers has not made out a *prima facie* case of age discrimination. I am reluctant to do so here, given the view of Massachusetts courts that the *prima facie* case is a "small showing" that is "easily made." *Sullivan*, 444 Mass. at 45 (citing *Che v. Massachusetts Bay Transp. Auth.*, 342 F.3d 31, 38 (1st Cir. 2003) (quoting *Kosereis v. Rhode Island*, 331 F.3d 207, 213 (1st Cir. 2003)).

racial discrimination. Consequently, I will grant Defendant's motion for summary judgment as to Count III.

2. Continental's burden to rebut *prima facie* case

Assuming Myers has made out a *prima facie* case of age discrimination under a force reduction analysis, the burden under *McDonnell Douglas* shifts to Continental, to articulate a lawful reason for the decision to terminate Myers, and to produce credible evidence that the articulated reason was the real reason for her termination. *Sullivan*, 444 Mass. at 50 (citations omitted). To meet its burden of production, Continental must proffer admissible evidence to show that it had business reasons, unrelated to age (or gender), for terminating Myers and not another employee. If the company produces such evidence, the presumption of discrimination disappears, and the burden shifts to Myers to adduce evidence that the articulated business reasons for her termination were mere pretexts to hide discrimination. *Sullivan*, 444 Mass. at 55. One way this could be done is by a showing that the reasons advanced as underlying the adverse employment decision are not true. *Id.*

Continental has produced ample evidence to satisfy its burden and demonstrate that Myers was terminated because of perceived poor performance, rather than for any discriminatory reason. Continental's evidence shows that a formal audit was conducted, which revealed problems on Robert's team. When Robert

failed to address the audit team's concerns adequately, he was terminated. The remaining team members were told that their performance was inadequate, and were given a formal opportunity to improve. Two of the employees were found to have complied with the improvement programs and were retained. The other six employees did not, and the ones who did not resign were put on more formal improvement plans, with clear warning that termination could result if marked improvement was not shown.

Myers acknowledges that she was given the opportunity to conform her conduct to Continental's expectations, and opted not to. Instead of conducting investigations as she had been instructed to do, she continued to settle claims, and resisted efforts by her manager to redirect her attention. After both improvement plans, the quality of Myers' files deteriorated, until eventually only 33% were considered satisfactory. Continental has produced both improvement plans, along with email messages, file evaluations, and an affidavit to support its legitimate business reason for terminating Myers. The company has met its burden of production, and the presumption of discrimination disappears. *Sullivan*, 444 Mass. at 54.

3. Myers' burden to demonstrate pretext

To survive summary judgment, Myers must adduce evidence that the reasons given by Continental for its actions were mere pretexts to hide discrimination. *Id.* This may be accomplished

by showing that the reasons advanced for the decision are not true. *Sullivan*, 444 Mass. at 55. Myers has referenced no adequate evidence to support a finding that Continental's stated reasons were pretextual. Myers apparently believes that her performance was consistently superior,[7] and this belief seems to be at the root of the dispute between the parties, not whether Myers was delivering acceptable work product. But the legal claim at issue concerns discrimination. Even if Myers' claim that she was suddenly evaluated based on subjective, rather than objective, criteria, is taken at face value, it does not reveal any hidden animus. Massachusetts state courts have made clear that the role of the Court is not to evaluate the soundness of a company's decision-making process. *Sullivan*, 444 Mass. at 56 (citations omitted). As in *Sullivan*, there is "ample, uncontroverted evidence" that Myers was selected for termination because the company felt her files were being badly handled, based on standards that were communicated prior to the evaluation. *Sullivan*, 444 Mass. at 57. The evidence Myers has adduced does not permit any reasonable inference, other than that she was selected for termination based on Continental's view of her individual performance. Consequently, I will grant summary judgment on Count I.

III. CONCLUSION

[7] See Amended Complaint ¶ 5.

For the reasons stated in more detail above, having found that Defendant is entitled to summary judgment on Counts I and III, the discrimination claims in Myers' Amended Complaint, I will also grant summary judgment on Counts II, IV, and VI, because these counts are dependent on a finding of discrimination. Finally, I will grant summary judgment on Count V, because Myers does not have standing to bring an action under the Privacy Act when it is conceded her own protected information was not revealed. Accordingly, the Clerk shall enter judgment for the Defendant.

/s/ Douglas P. Woodlock

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DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE